

# BRITISH RE-NATIONALIZATION AND REGULATION: THE GOVERNMENT'S LIABILITY TO SHAREHOLDERS\*

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## 1. INTRODUCTION

During the 1980s, Margaret Thatcher transformed the political and economic agenda of Great Britain. Emphasizing the traditional values of economic liberalism, Thatcher limited the role of the state in the economy and reduced the influence of trade unions. Privatizing many of its nationalized industries, the British Government sold off most of its shares in numerous industries, including British Telecom, Brit Gas, British Aerospace, and Cable & Wireless. The number of shareholders in Great Britain soared. Currently, Britain is second only to the United States as a shareholding democracy.<sup>1</sup>

Privatization had several effects which were vital to the success of the Thatcher government. First, privatization raised over eight billion pounds for the British treasury by 1988.<sup>2</sup> This money helped fund many of Thatcher's undertakings, including income tax reductions and the Falklands War.

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\* This Comment was written prior to the British general election in April 1992 as well as Neil Kinnock's subsequent resignation as Labour party leader. However, these events had little effect on the Labour party platform. The party's commitment, for example, to re-nationalization and regulation remain unchanged. The Labour party had abandoned its commitment to sweeping re-nationalization prior to the 1992 general election. By the mid-1980s, the Labour party had adopted its current policy favoring industrial regulation and limited re-nationalization.

The British populace did not reject the Labour party's commitment to re-nationalization and regulation when it elected the Conservatives to another term in April 1992. The Conservative's slim margin of victory can more accurately be attributed to Neil Kinnock's promise to increase taxes. Following Kinnock's resignation, the Labour party modified its tax plan. Yet, the Labour party has not retreated from its commitment to industrial regulation and limited re-nationalization.

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<sup>1</sup> K. HARRIS, *THATCHER* 156 (1988).

<sup>2</sup> DENNIS KAVANAGH, *THATCHERISM AND BRITISH POLITICS: THE END OF CONSENSUS?* 224 (1987).

Additionally, over 20% of the British population were shareholders by 1987.<sup>3</sup> The number of shareholders had an important impact on the electorate; by 1987, "MORI found [fifty-seven percent] of privatisation share buyers intending to vote Conservative . . ."<sup>4</sup> Privatization also directly affected the authority of the trade unions. By decreasing the number of nationalized industries, Thatcher reduced the authority of the public trade unions and, therefore, decreased the Labour Party's political strength. Thatcher thus increased her own power and insured major economic transformation.

Nevertheless, the 1990s may prove Thatcher's changes to be ephemeral. The liberal economic market, supported by privatized industries, may be modified. Because the Labour remains committed to public ownership and social services, it could regulate or re-nationalize British industry, substantially intervening in the free market, if it is able to defeat the lackluster government of Prime Minister John Major.

Regulation and re-nationalization represent real market alternatives for a putative Labour government, but the legal consequences of such structural changes are unclear. British law does not mandate a specific amount of compensation for individual shareholders if British industries are regulated or re-nationalized; therefore, the amount of compensation that will be given to shareholders is uncertain. British legal precedent and legislative statutes regarding previous nationalization provide insight into possibilities for future compensation. If privatized industries are regulated or re-nationalized, Britain's political agenda could influence shareholder liability. Compensation will be costly to the British treasury as well as to Labour. Depletion of the treasury could devastate the British economy and subsequently Labour's popularity.<sup>5</sup> Because British law does not mandate full compensation, the LP may use alternative compensation methods.

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<sup>3</sup> See HARRIS, *supra* note 1, at 156.

<sup>4</sup> *Class Voting Withers Away*, ECONOMIST, May 16, 1987, at 60. MORI, Market & Opinion Research International, is a prominent and respected British market research organization.

<sup>5</sup> See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). Downs argues that the populace inevitably votes according to the current health of the economy. In that case the Labour party would suffer politically during an economic downturn caused by treasury depletion.

## 2. LABOUR'S POLITICAL AGENDA

The LP has traditionally been associated with public ownership and national social services. From its election in 1979 the Thatcher government recognized the threat Labour posed to implementing Thatcher's agenda. In July of 1979 the Tory government announced the first sale of a nationalized industry, British Aerospace. Although the industry secretary, Keith Joseph, arranged the sale, many British were concerned about re-nationalization. During this time an *Economist* article illustrated the concern that re-nationalization would depress market prices: "[t]he market will have to judge these prospects, plus the political risk of a future Labour government's re-nationalisation."<sup>6</sup>

The threat of re-nationalization continued throughout the Thatcher years. Both the 1983 and 1989 Labour manifestos pledged to re-nationalize many privatized industries.<sup>7</sup> Re-nationalization was an important issue during British Telecom's ("BT") privatization. Prior to the sale the Thatcher government tried to enhance the market value of the industry to attract potential stockholders and to raise as much money as possible for the treasury. Concurrently, the Tories were trying to float the shares before the impending election so that Labour would be unable to re-nationalize. Yet Labour's allegiance to re-nationalization caused the price of BT shares to fall.<sup>8</sup>

The LP continued to support re-nationalization during the British Shipbuilders 1988 privatization. This time the Thatcher government did not float shares but rather sold the business directly to a private purchaser. The effect was the same according to Labour—the industry had been taken from the public in a for-profit sale to a private individual. This sale jeopardized the jobs of over 2,000 union members.<sup>9</sup> Bryan

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<sup>6</sup> *British Aerospace; Risk of Break-Up*, *ECONOMIST*, July 28, 1979, at 90.

<sup>7</sup> See 1983 Labour Manifesto, Labour Party (1983); see also 1989 Labour Manifesto, Labour Party (1989).

<sup>8</sup> *British Telecom; Shareholders Suffer*, *ECONOMIST*, July 12, 1986, at 74 (stating that "[t]he fall—the biggest since BT was floated 19 months ago—[sic] was prompted by a statement from Britain's Labour party suggesting that it plans to renationalise BT if it wins the next election.").

<sup>9</sup> See Michael Cassell, *Verdict on Wear Shipyards Put Off*, *FIN. TIMES*, Nov. 15, 1988, at 30.

Gould, Labour's trade and industry spokesperson, warned "that the future of British shipbuilding was 'too important to be sacrificed on the altar of privatisation.'"<sup>10</sup>

The Thatcher transformation has not substantially altered the Labour's current agenda. The 1991 Labour manifesto does not call for sweeping re-nationalization, but seeks instead to re-nationalize several industries, including the water industry.<sup>11</sup> By 1990 it had become obvious that the water industry would be targeted for re-nationalization because water had become increasingly polluted and more expensive during privatization.<sup>12</sup> In March 1990, Ann Taylor, the Labour spokesperson on water, noted that "the present regional structure of the industry would be retained but a return to public ownership would be a high priority."<sup>13</sup> Capitalizing on the water conditions, Ms. Taylor continued: "the starting point for a Labour government would be a commitment to an affordable supply of clean water for everyone and that Labour believed that the interest of a private monopoly industry would inevitably be in conflict with this aim."<sup>14</sup> Labour reiterated its commitment to re-nationalize the water industry shortly after releasing the manifesto. The *London Times* reported Labour's intentions:

One of the first acts of a Labour government would be to introduce consumer rights and environmental controls on the privatised water companies, Ann Taylor, Labour's environment protection spokesman, [sic] told the [Labour party] conference . . . [t]he party is committed to re-nationalising the water industry . . . [w]ater privatisation had confirmed Labour's worst fears, she said, leading to restricted access to public land, worse

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<sup>10</sup> *Id.*

<sup>11</sup> See Sheila Gunn, *How Policies Have Changed Since Foot's Manifesto*, THE TIMES, Oct. 4, 1991, at 7.

<sup>12</sup> See Michael Clark, *Falls in Water Shares Set to Level Off*, THE TIMES, Apr. 20, 1990, at 30 (discussing the fall in water industry shares due to fears of re-nationalization); see also Ivan Fallon, *Labour Discards State Control*, THE TIMES, Apr. 21, 1991, at 2 (stating that "a future Labour government is still intent on grabbing back" the water industry).

<sup>13</sup> Richard Evans & Andrew Hill, *Water Share Price Upset by Labour Plan*, FIN. TIMES, Mar. 27, 1990, at 24.

<sup>14</sup> *Id.*

pollution, and huge pay awards for directors.<sup>15</sup>

Labour also remains committed to re-nationalizing at least part of the electrical industry, especially the National Grid.<sup>16</sup> When the electricity industry was privatized in 1990 the Tories recognized the possibility of a Labour re-nationalization:

A partial sell-off would make it an obvious candidate for re-nationalisation if the opposition Labour party were to win the next general election, they [the U.K. government] said . . . if 49 pct [sic] of the power industry stays under state control, a Labour government would only have to buy two pct [sic] of the shares to renationalise it.<sup>17</sup>

The Tories were concerned that the LP would re-nationalize the National Grid. Because the National Grid was owned by twelve distributors whose profits primarily accrued from dividends, the LP could target it as an example of Tory profit-seeking.<sup>18</sup> The 1991 Labour manifesto, therefore, characteristically promised to return the National Grid to public ownership.<sup>19</sup>

The LP remains committed to re-nationalization of the hospital trusts, a division of the National Health Service (the "NHS"). While Labour has not promised to re-nationalize the entire NHS, it remains committed to re-nationalizing the hospital trusts. Political observers regard Labour as the party better able to capitalize on issues involving social services because Labour emphasizes the importance of suitable and

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<sup>15</sup> Sheila Gunn, *Controls Pledged for Water*, THE TIMES, Oct. 4, 1991, at 7.

<sup>16</sup> The National Grid transmits electricity through power lines to the regional electricity companies ("RECs"). The RECs then carry the electricity from the National Grid to local consumers. The National Grid is a separate entity and therefore an obvious target for re-nationalization efforts.

<sup>17</sup> Jane Merriman, *UK Power Sell-Off Seen Carrying Big Political Risk*, Reuters, May 10, 1990, available in Lexis, Nexis Library, Omni File.

<sup>18</sup> See Andrew Lorenz & Rufus Olins, *Selling Power to the People*, THE TIMES, Nov. 4, 1990, at 7.

<sup>19</sup> See Gunn, *supra* note 11; see also *Electricity Privatisation*, ECONOMIST, Nov. 17, 1990, at 76 ("Labour has pledged to take the national grid back into public control.").

affordable health care.<sup>20</sup> Labour's promise to re-nationalize the trusts will also be politically advantageous because many British voters are concerned that the Tories will privatize the NHS.<sup>21</sup>

Labour's promise to repurchase a majority of BT's shares further demonstrates its commitment to public ownership. The possibility of re-nationalization during BT's sale caused a plunge in BT's sale price.<sup>22</sup> The Tories seriously considered selling off state owned BT shares to protect it from re-nationalization.<sup>23</sup> Recently, labor renewed its promise to become a majority shareholder in BT. In addition, "The seven-year-old privatisation of British Telecom faced a threat of another sort: intentions to re-nationalise the company were periodically pronounced by the opposition Labour Party until as recently as August [1991]."<sup>24</sup> The 1991 Labour manifesto expressed an intent to acquire a majority stake in BT.<sup>25</sup> Labour's re-nationalization commitment illustrates a long-term goal that could be realized in a future Labour government.

Despite the preference for share ownership of some segments of British society, and despite the immense cost of re-nationalization, the Labour continues to advocate state ownership. At least one prominent political journalist, Tony Blair, has asserted that Britain's current political climate indicates a responsiveness to revival of the market and state economy. "[T]he potential for advance by socialist and social democratic parties has not been greater for many decades. The 1980s saw a frontal attack on the public sector by governments claiming to act on behalf of the individual. In

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<sup>20</sup> See *Labour and the NHS*, FIN. TIMES, May 22, 1991, at 16 ("The National Health Service has long been Labour's trump card.").

<sup>21</sup> See *id.* ("Labour's promise to take them [hospital trusts] back within the management of the health authority will be popular among voters who question the government's motives on the NHS . . .").

<sup>22</sup> See *British Telecom; Shareholders Suffer*, *supra* note 8.

<sup>23</sup> See also *Labour and Industry*, FIN. TIMES, Jun. 11, 1990, at 16; see *British Telecom*, FIN. TIMES, Aug. 21, 1990, at 16; see also Hugo Dixon, *State May Delay BT Stake Sale*, FIN. TIMES, Jan. 19, 1991, at 6 ("Labour policy is to take the company back into public ownership only if the government stake remains at 49 per cent.").

<sup>24</sup> Karen Lynch, *World Telecommunications 2*, FIN. TIMES, Oct. 7, 1991, at 11.

<sup>25</sup> See Fallon, *supra* note 12 (the 1991 Labour manifesto pledged to buy "the extra few per cent of BT to take its stake above 50%.").

the 1990s the agenda for 'public action' is back."<sup>26</sup> Because the Labour's agenda continues to reflect Great Britain's economic concerns, Labour will be able initiate areas such as state ownership when it is in power.

The essential values of the country, actually socialist values, remain: the right to own property and create wealth, but also social justice, the removal of poverty and the reduction of inequality; the need for a market economy, but also for market intervention in the interests of the community. People want public services to be accessible and of high quality, but they do not want them privatised or run for profit.<sup>27</sup>

### 3. PRESSURE ON THE LABOUR PARTY

Party members and officials do not alone determine a political party's agenda. Rather, each party is sensitive to the current political, social, and economic issues and respond according to party philosophy. For example, Labour's political agenda during the 1980s was responsive to the changes that Thatcherism brought to Great Britain. Thatcher's government had transformed the British political agenda by compelling even her political opponents to focus on the priorities she set and, in part, to adopt policy solutions devised during her administration. Nationalization, therefore, remains an important priority for the LP, due in part to the Tory's rampant privatization.

Rank and file Labour members are pressuring the Labour party to develop a political agenda different from the one adopted by the leadership. The young socialists constantly exhort the LP to implement radical social and economic policies, such as nationalization without compensation, or at the very least, they suggest that compensation should be need-based.<sup>28</sup> With over three hundred branches at the constituency level, the young socialists are politically significant. Therefore, Labour's emphasis on re-nationalization is impor-

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<sup>26</sup> Tony Blair, *Labour's Agenda: Socialism in a Free Market*, THE TIMES, Sept. 29, 1991, at 4.

<sup>27</sup> *Id.*

<sup>28</sup> See *Young Socialists; How Left Can You Get?*, ECONOMIST, Mar. 6, 1976, at 27.

tant to the young socialists, as well as to Labour's electoral success. Labour acknowledges that a failure to appease the young socialists and their followers may weaken its hopes for election.

Many Labourites remain loyal to the party's socialist objectives and attempt to influence Labour's platform accordingly. Rebel left-wingers remain in the party and were pivotal during the 1991 elections. In the May 1991 council elections, rebel left-wingers won five of the six wards in which they challenged official Labour candidates.<sup>29</sup> The traditional Labourites may cause the Labour party to cling to its socialist ideals. Rebel left-wingers have accused the current Labour party of being "wedded to the capitalist system,"<sup>30</sup> and of "moving much closer to the Thatcherite consensus."<sup>31</sup> Nationalization, a backbone of socialist ideology, will be a critical issue for Labour to address in order to maintain the support of its traditional constituents. As a result, labour may modify its current position, limiting the number of industries it proposes to renationalize to better conform to the views the rebel Labourites espouse.

Other factors, such as the success of other political parties, influence the Labour. One such party is the Scottish National Party (the "SNP"). Although the SNP was established many years ago, its power increased dramatically during the 1970s, due to the discovery of oil in the North Sea.<sup>32</sup> By 1989, the SNP controlled 21% of the Scottish vote.<sup>33</sup> The September 1991 election of Jim Sillars to SNP leader sparked a leftward political revision designed to attract Labourites. This revision entailed plans for re-nationalization in the electricity, gas and transport industries.<sup>34</sup>

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<sup>29</sup> See Andrew Grice, *Dying Heffer Labels Kinnock a Stalinist*, THE TIMES, June 2, 1991, at 7.

<sup>30</sup> *Id.*

<sup>31</sup> Michael Cassell, *Kinnock Package Approved*, FIN. TIMES, May 9, 1989, at 1 (quoting Tony Benn, left-wing MP for Chesterfield).

<sup>32</sup> See *The Four Lands*, ECONOMIST, Dec. 10, 1983, at 28. The SNP ran on the slogan "It's Scotland's Oil" and won 30% of all the votes cast in Scotland in the 1974 general election. *Id.*

<sup>33</sup> *Scots Aware*, ECONOMIST, May 6, 1989, at 12.

<sup>34</sup> See James Buxton, *Sillars Wins SNP Deputy Leadership*, FIN. TIMES, Sept. 23, 1991, at 8 (stating these "moves to the left were intended to attract Labour voters.").



The SNP platform has influenced Labour's platform. The SNP is attempting to attract Labour voters by adopting Labour positions, including wide-spread re-nationalization. Since the SNP has become increasingly important to the LP's success, the LP cannot disregard the SNP's maneuvers.<sup>35</sup> The Labour party's allegiance to limited re-nationalization is not only the Labour leaders' priority but also a call for support from those not generally sympathetic to the current leadership. Labour should respond favorably to these pressures. A favorable response includes commitment to re-nationalization.

#### 4. THE POLITICAL DOWNSIDE TO PRIVATIZATION

Privatized industries have become an increasing liability to the Conservative government. Presumably, privatization's success has fueled its primary criticism—the British public, especially the consumers, pay extraordinary rates while the shareholders enjoy the fruits of increasing profits.<sup>36</sup> For example, British Telecom's 1990-1991 profits were 3.1 billion pounds.<sup>37</sup> One water company, South West Water, had pre-tax profits of 88.2 million pounds for 1990,<sup>38</sup> while another, North West Water, reported a 21% profit increase in 1990 to 215 million pounds.<sup>39</sup> British Gas profited 1.6 billion pounds in 1990.<sup>40</sup>

The failure of privatization to uniformly enhance service aggravates this problem. The water industry privatization which resulted in deteriorating water quality illustrates these service problems: "Britain's rivers are now more polluted with sewage than before water privatisation, despite the rising profits of water companies and higher charges to customers

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<sup>35</sup> In November 1991 the Labour party took a district from the Conservative party in eastern Scotland. The Scottish National Party's support was crucial to the Labour victory. See William E. Schmidt, *Conservatives Defeated in 2 British Districts*, N.Y. TIMES, Nov. 10, 1991, at 19.

<sup>36</sup> See *Rivers Get Dirtier as Water Firms Divert Their Profits*, THE TIMES, Jun. 16, 1991, at 2.

<sup>37</sup> *Can the Regulators Hold Them*, ECONOMIST, June 1, 1991, at 55.

<sup>38</sup> Ross Tieman & John Young, *Labour Steps Up Attack on Privatised Profits Boom*, THE TIMES, Jun. 3, 1991, at 22.

<sup>39</sup> *Rivers Get Dirtier as Water Firms Divert Their Profits*, *supra* note 36.

<sup>40</sup> Ross Tieman, *Gas Makes Pounds 65 Profit from Each Small User*, THE TIMES, Nov. 8, 1991, at 3.

... [t]he number of sewage pollution incidents increased by 20% last year to 6,274.<sup>41</sup> Furthermore,

North West Water, which reported a 21% profit rise to Pounds 215m, runs 14 sewage works that discharge illegal levels of sewage. South West Water, whose profits increased 16.6% up to Pounds 51.4m, has 61 sewage works discharging illegal levels; Yorkshire (profits up 12% to Pounds 114.1m) has 27 sewage works in breach of limits; Anglian (9% to Pounds 153m), 32 illegal works; and Welsh Water, 59 illegal works.<sup>42</sup>

The critique of privatization has gained credibility from the enormous salary increases industrial executives have recently received. The salary of the chairman of Thames Water rose over 100% in 1991 despite Britain's poor economic condition.<sup>43</sup> "The rise reflects a basic pay increase, plus a special bonus because Thames, the biggest of the privatised water companies, exceeded its profit target."<sup>44</sup> Robert Evans, the chairman of British Gas, took a 66% increase in June 1991; John Baker, National Power, 58%<sup>45</sup>; Iain Vallance, British Telecom, 12.5%.<sup>46</sup>

The Conservative party has suffered from the recent privatization controversy because privatization forces it to sit on a political fence. The Conservative government enticed the shareholders with a real chance for profitable investment.<sup>47</sup> "[S]hareholders, unlike customers, like big profits," because it means larger dividends.<sup>48</sup> Shareholder satisfaction depends upon the privatized industries' ability to amass large profits which in turn, anger the British public. The Conservatives can only please their loyal supporters, the shareholders, by angering their sympathizers.

The economic climate which has resulted, in part, from

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<sup>41</sup> *Rivers Get Dirtier as Water Firms Divert Their Profits*, *supra* note 36.

<sup>42</sup> *Id.*

<sup>43</sup> Jeff Randall & Fiona Walsh, *Water Chief Set to Double His Money*, THE TIMES, June 30, 1991, at 3.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Andrew Lorenz, *BT 'Doctored Profits'*, THE TIMES, Nov. 3, 1991, at 1.

<sup>47</sup> *Can the Regulators Hold Them*, *supra* note 37.

<sup>48</sup> *Id.*

privatization has led to skepticism of the Conservative party. Many of the industries operate as privatized monopolies. Although the industries have been removed from state control, they have not broken down. The increasing prices and profits of the large privatized monopolies force a high rate of inflation.<sup>49</sup> The RPI-minus-X scheme which regulates profit in an attempt to check inflation has not worked.<sup>50</sup> In addition to privatization's other problems, it also causes an inflation spiral which the government has difficulty regulating through the private monopolies.<sup>51</sup>

The problems with privatization have had a negative impact on the Conservative party. "With the bull market over, many voters may now be more concerned about inflationary threats than excited about popular capitalism."<sup>52</sup> The condition of the privatized industries in comparison to the average consumer and voter has engendered discontent among the electorate. Eventually, Labour may capitalize on this discontent. Labour has "stepped up its attack on the profitability of privatised utilities in a renewed effort to ensure that the question becomes an electoral issue."<sup>53</sup>

Marjorie Mowlam, shadow minister for corporate affairs, called for a government review of regulatory controls, to ensure that 'excessive' profits at British Telecom and British Gas were used to improve services.

Speaking in East Kilbride, she said: "The public know [sic] when they are being ripped off, and when it comes to the crunch I believe they will vent their anger and frustration at the ballot box."<sup>54</sup>

The Labour's commitment to re-nationalization is increas-

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See John Plender, *Tilting at Tory Monopolists*, FIN. TIMES, Apr. 22, 1988, at 23 (stating that "the process of privatising state monopolies threatens to institutionalise a form of inflation that the public sector ownership had gone a long way towards eradicating.")

<sup>52</sup> *Id.*

<sup>53</sup> Tieman & Young, *supra* note 38.

<sup>54</sup> *Id.*; see also Randall & Walsh, *supra* note 43 ("Labour politicians will be quick to seize on Watts's pay rise as another example of company chairmen cashing in while ordinary workers are asked to accept moderate increases.")

ingly advantageous given the recent political fallout from of privatization. Labour's commitment to re-nationalization will become more attractive the more the British economy fails and the privatized industries suffer from poor publicity. Labour will capitalize on public sentiment; re-nationalization will therefore become an increasing possibility. Re-nationalization, especially in the utilities, is seen as a way to stop the abuses of privatization. In a speech made at the Labour party conference in 1989, Neil Kinnock voiced his concern over the privatization of utilities:

The people know, as we know, that it is simply wrong to put vital utilities of this kind into the hands of private monopolies, not least because they know, as we know, that the whole trust of privatisation collides head on with the concern for the environment. Privatisation of water and electricity also puts a hold straight through the Government's claim to be guardians of the environment.<sup>55</sup>

## 5. STATE LIABILITY TO SHAREHOLDERS

The possibility of re-nationalization raises important legal issues, including state liability to the shareholders of privatized industries. If any of the privatized industries are re-nationalized in accordance with Labour's political agenda, many shareholders will lose possession of their shares. Those shares will be subject to public ownership and state control.

The state's liability to the shareholders in this situation is complex. British law does not mandate compensation.<sup>56</sup> Compensation is an issue that will not be decided until re-nationalization occurs and the terms of compensation are statutorily promulgated.<sup>57</sup> Yet these terms may not satisfy shareholders, who may challenge them in the courts. While

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<sup>55</sup> Neil Kinnock, Speech at the Labour Party Conference in Brighton, Oct. 3, 1989.

<sup>56</sup> Like the United States, Great Britain is a common law country. Legal precedent is ordinarily binding on subsequent cases involving the same issue. Nevertheless, subsequent cases are often distinguished from binding precedent.

<sup>57</sup> See *Nationalization Policy*, BUS. INT'L, Aug. 1987 ("Each nationalisation case is subject to a different parliamentary bill.").

the courts might sanction compensation for a specific case, the approved scheme will not necessarily bind other re-nationalization endeavors.

This process may become increasingly complex since the cost of any compensation would drain the British treasury, possibly devastate the economy, and consequently damage the LP.<sup>58</sup> Thus, the LP may seek alternative forms of state control, including majority state ownership or substantial regulation. In addition, Labour may consider various forms of compensation, including fair market value (a complex legal issue in its own right), state controlled shares, or making other entities responsible for compensation. These alternatives raise questions of legality under British law.

## 6. PRESUMPTION OF COMPENSATION

Britain's economic structure significantly changed during the 1940s and 1950s. Throughout this period the LP instituted consensus politics primarily based on Keynesian economics. Dennis Kavanagh, a prominent British political scholar, has discussed the application of Keynesianism to post-war British domestic policy:

The package of policies on the domestic front is familiar: full employment budgets; the greater acceptance—even conciliation—of the trade unions; whose bargaining position was strengthened by an increased membership and full employment; public ownership of the basic or monopoly services and industries; state provision of social welfare, requiring in turn high public expenditure and taxation; and economic management of a sort, via a large public sector and a reduced role for the market.<sup>59</sup>

Essentially, Keynesian economics expands the arena of governmental intervention. It allows for the nationalization of industries, the primacy of trade unions, and government

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<sup>58</sup> See Cassell, *supra* note 31 (stating that Mr. Bryan Gould, Shadow Trade and Industry Secretary, "warned that any suggestion of confiscation of privately owned assets would be 'electorally disastrous' [to Labour]."); see also HARRIS, *supra* note 1, at 185 (finding that in 1988 there were nine million shareholders in Great Britain).

<sup>59</sup> KAVANAGH, *supra* note 2, at 34.

owned housing. Keynesian economics in practice constructs a 'Welfare State.' Although the tenets of this economic theory best suit the ideals of the LP, the Conservative party resigned itself to many of its ideas during the consensus period from 1945 to 1970.

Labour has pursued policies in accordance with Keynesian dogma. The governments of the post-war consensus played an important role in the economy. For example, "for most [of] the inter-war years state spending rarely exceeded 25 per cent of the GNP; since 1945 it has never fallen below 36.5 per cent."<sup>60</sup> Labour began a surge toward nationalizing major industries and monopolies; much of the country's economic framework therefore came under state control during this time.

Labour implemented these economic changes through statute. One commentator has described the legal nationalization:

Most of the main Acts have a similar form. They begin by prescribing the position of the new corporation and its governing board, its powers, and duties. Then the terms of compensation are set out, followed by the financial arrangements of the new body. The principle of full compensation had been accepted, after some argument, by the Labour Party between the wars. The Acts provided for the compulsory replacement (usually at market value on a certain day) of existing stocks and shares by new fixed-interest stock, which carried no ownership rights but which could be bought and sold like other Government securities.<sup>61</sup>

Compensation, then, during the consensus period was statutorily determined and implemented in accordance with the Parliament's decision.<sup>62</sup> The major nationalization efforts were achieved through statute, including: the Bank of England Act 1946, the Coal Industry Nationalisation Act 1946, the Civil Aviation Act 1946, the Transport Act 1946, the

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<sup>60</sup> *Id.* at 31-32.

<sup>61</sup> LEONARD J. TIVEY, NATIONALISATION IN BRITISH INDUSTRY 43 (1966).

<sup>62</sup> See NATIONALIZATION: A BOOK OF READINGS 18 (A.H. Hanson ed., 1963) ("[C]ompensation to the former owners of their assets has been one of their [nationalized industries] first financial obligations.").

Electricity Act 1947, the Gas Act 1948 and the Iron and Steel Act 1949.<sup>63</sup> These statutes all included specific provisions for compensating private shareholders. For example, the Coal Industry Nationalisation Act of 1946 provides that:

[t]he compensation to be made in respect of the interests vested as aforesaid of a body administering a central selling scheme in such stocks as aforesaid shall be of an amount equal to the value thereof as determined, in default of agreement between the Minister and the trustees for that bond, by arbitration under this Act, shall be satisfied by a money payment made to those trustees, and, when paid, shall be dealt with as if it had been money received by that body in respect of sale of coal.<sup>64</sup>

Parliament also mandated compensation in other statutes including the Transport Act of 1962: "[a] stock holder in respect of whose holding any such stock or share certificate or similar document is outstanding shall be entitled under the said Regulations of 1943, or any regulations replacing those regulations, to a stock certificate".<sup>65</sup> Yet the Transport Act of 1962 vested discretion in the Minister in determining proper compensation: "[a]n order under this section [§83] may contain such consequential and supplementary provisions, including provisions for the assessment of compensation, as the Minister may think fit, and notice of the order shall be published in such manner and form as the Minister may direct."<sup>66</sup> Furthermore, the Aircraft and Shipbuilding Industries Act of 1977 provides that "[c]ompensation for the vesting in a Corporation by virtue of this Part of this Act of the securities of any company shall be satisfied by the issue of government stock".<sup>67</sup>

Thus, compensation of shareholders pursuant to nationalization has always been statutorily decided.<sup>68</sup> Re-nationaliza-

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<sup>63</sup> See TONY PROSSER, NATIONALISED INDUSTRIES AND PUBLIC CONTROL 22 (1986).

<sup>64</sup> Coal Industry Nationalisation Act, 1946, 10 Geo. 6, ch. 59.

<sup>65</sup> Transport Act 1962, 10 Eliz. 2, ch. 46, sch. 7.

<sup>66</sup> *Id.* § 83.

<sup>67</sup> Aircraft and Shipbuilding Industries Act 1977, 25 Eliz. 2, ch. 3, § 35.

<sup>68</sup> Interestingly, the statutes providing for privatization during the

tion of industry, although a strong possibility during the next Labour government, has not occurred. Therefore, compensation for future re-nationalization is a matter of speculation. While the terms of compensation will probably be statutorily mandated, the amount of compensation remains uncertain.<sup>69</sup>

Although most of the nationalization statutes provide for compensation, they generally do not indicate the actual amount. For example, the Coal Nationalisation Act of 1946 provides for a "money payment,"<sup>70</sup> but the statute does not specify actual compensation. Other statutes provide for calculating compensation. For example, the Aircraft and Shipbuilding Act of 1977 provides that "the amount of compensation due to any person in respect of any securities of a company which are held by him immediately before the date of transfer of that company shall be an amount equal to the base value of those securities".<sup>71</sup> Yet even these provisions do not include specific provisions for computation.

The British legal system is left to interpret the proper level of compensation to shareholders. The courts have traditionally interpreted the amount of compensation to be the fair market value of the shares.<sup>72</sup> Although neither the courts nor Parliament are bound to this interpretation, fair market value has been a customary interpretation.

Once the court has interpreted the level of compensation as the fair market value of the shares, the court must further compute the monetary equivalent of the fair market value. This compensation computation has troubled democratic courts in many instances.<sup>73</sup> Identifying the day upon which the

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Thatcher era also furnish compensation to the employees of previously nationalised industries. See British Steel Act 1988, 35 Eliz. 2, ch. 35, § 3.

<sup>69</sup> See generally TIVEY, *supra* note 61, at 182-89.

<sup>70</sup> *Id.* (citing the Coal Nationalisation Act).

<sup>71</sup> Aircraft and Shipbuilding Industries Act 1977, *supra* note 67.

<sup>72</sup> See *Morgan v. Tate and Lyle*, [1952] T.R. 477.

<sup>73</sup> For example, the United States courts employ the appraisal rights model for calculating compensation. The appraisal rights model compensates the American shareholder with the fair market value of her shares, predating the effects of a rumored merger or nationalization. See Thomas D. Hall, *Valuing Closely Held Stock: Control Premiums and Minority Discounts*, 31 EMORY L. J. 139, (1982) ("shareholders typically have the right to force the corporation to purchase their shares at fair market value."). Yet, application of the appraisal rights model has led to various results. The courts have given different values weights to the effects of



value of the shares will be assessed presents the main problem. The market value of the shares invariably depends on the effect of nationalization.<sup>74</sup> Because the statutes ordinarily did not specify the amount of compensation, they did not specify the date for assessment either. The ambiguous date of valuation fosters legal controversy.

Although the LP may institute nationalization along with a statute providing for fair market value, this value itself will engender controversy. "Labour leaders have stressed that whatever form of public ownership is introduced, shares will be bought back at the market price."<sup>75</sup> Yet, market price is necessarily variable. Nationalization can severely depress a stock's market value.

In Labour's policy review, the relevant phrase covering repurchase of shares is that they would be bought at "a fair market price." Understandably, people thought this to mean that a Labour Government would not go out of its way to depress the price in advance of re-nationalisation. But the review went on to say that all the major utilities would become "public interest companies" each with its own "public interest commission" who would set pricing policy according to "interest which are wider than those of the shareholder and their owners." Mr. Kinnoch was not able to disown Mr. Gould, because Mr. Gould was merely setting out what was implied in the policy review. The words "fair market price" can after all, justify re-nationalisation

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nationalization. See Joel Seligman, *American Law Institutes's Corporate Governance Project: Remedies: Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829, 855 (1984) ("The weighting process appears to be indefensibly arbitrary and capricious.").

<sup>74</sup> For example, the French government was criticized for undercompensating shareholders when the several industries were nationalized in the early 1980s. The French government recognized the effect of nationalization and therefore averaged the share value in 1978, 1979, 1980. Yet, these efforts did not compensate adequately, according to some shareholders. See *A Less-Than Franc Exchange*, ECONOMIST, Nov. 14, 1981, at 99 ("While that [effort] eliminates any depression of the Paris bourse as a consequence of the Mitterrand election victory, it is probably an inadequate proxy for market value at the time of nationalisation.")

<sup>75</sup> Evans & Hill, *supra* note 13.

without compensation if the business is worthless.<sup>76</sup>

The water industry has already demonstrated the problem of the depressing effect. In April 1990 shareholders in the water industry were already suffering from the threat of Labour re-nationalization. The share value was plummeting in anticipation of the upcoming election. "[F]ears of re-nationalization" led to a "sharp fall in the [value of] water company stock."<sup>77</sup> Furthermore, in March 1991 the depressing effects continued: "U.K. Shares closed lower in moderately active trading, depressed by political and economical worries . . . [T]he weekend polls depressed water shares in particular as analysts said water company shareholders feared a Labour government would re-nationalise the companies if it were elected into government."<sup>78</sup>

Thus the threat of re-nationalization will depress the market value of shares in many privatized companies. If a Labour government should re-nationalize the industry, the monetary equivalent of fair market value (if statutorily mandated) will be controversial. Legal precedent indicates that unless a statute specifically accounts for the depressing effect, the fair market value of the shares will be equal to their monetary value on the vesting or transfer date.<sup>79</sup>

In *Studholme v. Minister of Fuel and Power*, the plaintiff held stock in a gas company nationalized under the Gas Act of 1948.<sup>80</sup> "[B]etween 1945 and the vesting date, the threat of nationalization, consequent on the result of the general election [in 1945], depressed the prices of comparable securities and the company's securities."<sup>81</sup> Section 25(1) of the Gas Act of 1948 provided that:

[e]very holder of securities of any undertaker to whom this Part of this Act applies . . . shall be entitled to be compensated by the issue to him by the Gas Council, in

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<sup>76</sup> *The Labour Party's Policy Review and the Utilities*, FIN. TIMES, Sep. 26, 1990, at 27.

<sup>77</sup> Clark, *supra* note 12.

<sup>78</sup> *UK Stocks Close Lower on Worries and Profit-Taking*, REUTER FIN. REP., Mar. 25, 1991.

<sup>79</sup> See *Studholme v. Minister of Fuel and Power*, 2 K.B. 804 (C.A. 1951).

<sup>80</sup> *Id.* at 806-07.

<sup>81</sup> *Id.* at 809.

accordance with the provisions of the second schedule to this Act, of British Gas Stock of such amount as in the opinion of the Treasury is at the vesting date of a value equal to the value of the said securities held by him, regard being had (in estimating the value of the stock so issued) to the market value of government securities at or about the vesting date.<sup>82</sup>

During the period preceding the nationalization of the gas industry the value of comparable stocks rose while the value of gas shares declined.<sup>83</sup> Therefore, the counsel for the plaintiff "claimed that according to the true reading of sub-s. (10) the tribunal, in making its valuation, must exclude any effects that the Gas Act had on these later securities."<sup>84</sup> Yet, the court denied the plaintiff's claim because the statute had not accounted for the negative effect and therefore, neither would the court. The court found that "[i]f it was intended to exclude from consideration some matter of fact which was there and which plainly did affect the subject-matter under consideration, [one] should most certainly expect that Parliament deliberately and expressly so to have provided, as, indeed, it is known it frequently does."<sup>85</sup> The court did not, however, foreclose subsequent courts from accounting for other factors as they believed necessary: "[I]t would be very dangerous and wrong if this court now attempted to make a complete and exhaustive category of the particular factors which, in any given, case, the [tribunal] ought to take into account."<sup>86</sup>

The legal uncertainty regarding compensation to shareholders leaves many questions unanswered for future re-nationalization. *Studholme* illustrates this uncertainty. A statute may or may not provide for a fair market value standard. If it does not, the courts must interpret the proper standard; if it does, the courts must still interpret the proper value. If a statute does not provide specific procedures for determining a stock's

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<sup>82</sup> *Id.* at 807 & n.1 (quoting Gas Act, 1948, 11 & 12 Geo. 6, ch. 67, § 25).

<sup>83</sup> *Id.* at 811.

<sup>84</sup> *Id.* at 819.

<sup>85</sup> *Id.* at 820.

<sup>86</sup> *Id.* at 824.

value,<sup>87</sup> courts are left to decide the method of calculation and the value. Even if the courts respect the Parliament's silence, as in *Studholme*, they still determine the terms of compensation because they do not compensate for the depressing effect of nationalization.<sup>88</sup> Because the method of calculation for compensation is not legally mandated, Labour has an opportunity to manipulate the value.

#### 7. LABOUR'S DIFFICULTY WITH THE FAIR MARKET VALUE STANDARD

The Labour party would have difficulty keeping its pledge to re-nationalize several privatized industries if it mandates a fair market value standard which compensates for nationalization's depressing effect. First, the money required to re-nationalize the privatized industries would severely strain the British economy. By December 1989, "over 600,000 jobs [had been transferred] to the private sector . . . and the state industries' share of GNP will have fallen to around 6 1/2%."<sup>89</sup> By July 1990 "27.5 billion of state-owned assets [had been returned] to the private sector."<sup>90</sup> The money needed to finance re-nationalization would drain the British Treasury and cause economic difficulties. The final cost would be even greater because the state would then have to fund the newly nationalized industries. According the Appropriation Act of 1988, the "expenditure by the Department of Transport on support to nationalised transport industries and to ports; rebate of fuel duty to bus operators; and costs of the driver testing and training organisation," was budgeted for

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<sup>87</sup> Some statutes have tried to account for the depressing effect of nationalization and have compensated for it. In that case the courts would certainly defer to the parliament's intent. See *id*; see also Aircraft and Shipbuilding Industries Act, 1977, *supra* note 67 ("Where compensation stock falls . . . the amount of stock . . . is equal on the date of issue to that amount of compensation, regard being had (in estimating the value of the compensation stock so issued) to the market value of other government securities at or about that date.").

<sup>88</sup> The *Studholme* court did not compensate for the depressing effect of nationalisation when determining the fair market value of the shares. See *Studholme*, *supra* note 79.

<sup>89</sup> *Britain Leads the Way*, *ECONOMIST*, Dec. 21, 1985, at 83.

<sup>90</sup> *Business Overview—Political Assessment*, *ECON. PUB.*, Jul. 1, 1990.

24,700,000 pounds.<sup>91</sup>

### 8. LESS THAN FAIR COMPENSATION

Given the expense of to re-nationalization, Labour must consider alternative methods of nationalization or compensation in order to avert political suicide. In the past the Labour party has suggested nationalization with less than fair market value compensation. For example, some commentators assert that the depressing effect of nationalization should not be considered because the shareholders were given a discount on market value when shares were initially offered.<sup>92</sup> Furthermore, when Labour nationalized the Shipbuilding Industry in 1977, Tony Benn, a prominent Labourite, suggested compensation without considering nationalization's depressing effect on stock values. One article noted reaction to such a proposal:

As for the compensation terms, shipbuilders are up in arms against Mr. Benn's proposal to use average share prices for the six months up to February 28, 1974, the date of the election that brought Labour to power. This period was affected by the three-day week and also by fears that Labour would indeed win. [I]n any event, there is no strong case for the City's hope that compensation would be based on asset values.<sup>93</sup>

Current shareholders have expressed concern that the Labour party will not fully compensate under nationalization. When the LP refused to incorporate the European Convention on Human Rights into British law in January 1990, many critics claimed that Labour planned to compensate private shareholders at less than fair market value upon re-nationalizing. One commentator noted:

Labour's argument against incorporating the European Convention as at least part of a Bill of Rights is . . . [that it would mean] protecting rights with which parts of the Labour Party are out of sympathy. It would

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<sup>91</sup> Appropriation Act, 1988, ch. 38.

<sup>92</sup> See *Denationalisation*, *ECONOMIST*, Apr. 14, 1979, at 108 (the market value accounts for "[t]he discount on market value that is normally offered to tempt investors when shares are offered for sale").

<sup>93</sup> *Fair Bargain in the Shipyards?*, *ECONOMIST*, Mar. 22, 1975, at 78.

almost certainly protect the public schools,<sup>94</sup> for instance, and the rights of people who have bought shares in the privatized industries, such as British Gas and British Telecom, to fair compensation if they are ever re-nationalized.<sup>95</sup>

Labourites have also called for nationalization or re-nationalization without any compensation at all. The young socialists have traditionally regarded compensation as an unnecessary benefit to those who have invested in a system that serves the wealthy. In the past, the young socialists have made "numerous calls for nationalisation of just about everything—without compensation or with compensation on the basis of need only."<sup>96</sup> Similarly, Neil Kinnock, the Labour party leader, has called for nationalization without compensation.<sup>97</sup> Nationalization without full compensation is not only a political necessity for the Labour in the future but is also on the political agenda of several party members.

Although a presumption favoring fair market value exists, there are several alternatives to the fair market value system in legal precedent. Historically British law has varied from offering compensation above fair market value to compensation less than fair market value.<sup>98</sup> Until the Land Act of 1919, landowners were compensated above fair market value.<sup>99</sup> "Great Britain formerly required that condemnees receive

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<sup>94</sup> These schools operate as private schools would in the United States.

<sup>95</sup> Julia Neuberger, *Labour's Half-Hearted Step to a Bill of Rights*, THE TIMES, Jan. 10, 1990, at 12.

<sup>96</sup> *Young Socialists, How Left Can You Get*, *supra* note 28.

<sup>97</sup> See ERIC HEFFER, NEVER A YES MAN (1991) (Eric Heffer, a life-long Labourite and companion of Neil Kinnock, asserts that Neil Kinnock espoused the idea of nationalization without compensation); *see also* Grice, *supra* note 29 (recognizing that Neil Kinnock has called for nationalization without compensation).

<sup>98</sup> During the postwar era, many European countries, including Britain, compensated less than full market value for nationalization. *See* Oscar Schachter, Comment, *Compensation for Expropriation*, 78 AM. J. INTL L. 121, 124 (1984) ("It was clear that European state practice showed substantial deviation from what one would ordinarily understand as 'full' compensation or as prompt and effective payment . . . [and] examination of state practice in cases of postwar nationalization showed that compensation was less than full value (or fair market value)").

<sup>99</sup> Land Act, 1919, 9 & 10 Geo. 5, ch. 57.

110% of fair market value as compensation."<sup>100</sup> However, one scholar has noted that "[i]n some cases [compensation in excess of fair market value] would undoubtedly provide the condemnee with a windfall, and could thus produce a kind of tertiary rent seeking; property owners might maneuver to get their property condemned in circumstances where they would receive bonus compensation."<sup>101</sup> In fact, large compensation awards were one reason for repealing the generous Land Act statute.<sup>102</sup>

There is also British legal precedent for compensation at less than fair market value.<sup>103</sup> *Regina v. Lithgow*<sup>104</sup> is a prominent case sanctioning the "less than fair market value" system.<sup>105</sup> In that case, the government acquired the plaintiff's shares when the aircraft and shipbuilding industries were nationalized in 1977.<sup>106</sup> The plaintiffs claimed that the compensation paid for their shares was grossly inadequate in comparison to their market value.<sup>107</sup> Their claim relied on the fact that British nationals were paid far less compensation than were foreigners who owned shares in the same industry.

<sup>100</sup> Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL LAW REV. 61, 92 n.97 (1986).

<sup>101</sup> *Id.* at 92.

<sup>102</sup> *See id.* at 92 n.97.

<sup>103</sup> *See National Coal Board v. Brook*, [1970] R.A. 448, 448 (1970) (accepting the fact that "[a]t the time of nationalisation, compensation for the heap [of coal] had been claimed and paid in respect of only 15,000 [of the 208,000] tons of material."); *see also* Petroleum Act, 1934, 24 & 25 Geo. 5, ch. 36, § 2 (which nationalized the nation's petroleum without compensation).

<sup>104</sup> *Lithgow and Others v. United Kingdom*, 102 Eur. Ct. H.R. (ser. A) at 1 (1986).

<sup>105</sup>

[T]he European Court of Human Rights resolved a long and bitterly argued dispute by rejecting claims for more compensation by former private shareholders of shipbuilding and aircraft companies that were nationalised in 1977 by a Labour government. Disappointed claimants are urging BT shareholders to sell now, to avoid a similar fate.

*British Telecom, Shareholders Suffer*, *supra* note 8.

<sup>106</sup> *See Aircraft and Shipbuilding Industries Act 1977*, *supra* note 67.

<sup>107</sup> *See* Raymond Hughes, *Government Accused of Being Inflexible*, FIN. TIMES, June 27, 1985, at 7 (the plaintiffs objected because "the payment of compensation . . . was not reasonably related to the value of their property when it was taken.").

Nevertheless, the European Court found that a state can distinguish between nationals and non-nationals and that the British nationals were adequately compensated in this case.<sup>108</sup> The British court affirmed this result.<sup>109</sup>

The argument for compensation based on less than market value for British nationals is sound for several reasons. British citizens receive benefits from the state that can make up for compensation of less than fair market value. According to one scholar, "there are compelling considerations of fairness that may justify not applying the same rules to aliens as to nationals."<sup>110</sup> Unlike British nationals, the non-nationals "do not share equally with citizens in the benefits accruing to the polity as a whole from the 'balancing' and arguably should not have to bear the commensurate burdens."<sup>111</sup> "[T]he United Kingdom did not violate international law by taking the property of its own nationals for less than full compensation but could not do so with respect to foreign-owned property."<sup>112</sup>

Furthermore, the public interest at stake, state ownership of industry, is more important than the full compensation of individuals who risked money in the stock market. At least one scholar has accepted this rationale: "a fair balance must be struck between the demands of the community's general interests and the requirements of the protection of the

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<sup>108</sup> Lithgow, 102 Eur. Ct. H.R. at 40. Other courts have distinguished between nationals and non-nationals regarding compensation for nationalization. In *INA Corp. v. The Islamic Republic of Iran*, Iran-United States Claims Tribunal, The Hague, Aug. 13, 1985, the American plaintiffs sought compensation for their ownership interest in Bimeh Sharqh, an Iranian insurance company. The court awarded full market value compensation to the Americans, disregarding the depressing effect of nationalization. See generally Monroe Leigh, *Decision of the Iran-United States Claims Tribunal: Expropriation—Standard of Compensation Under International Law—"Fair Market Value" Versus "Prompt, Adequate and Effective Compensation"*, 80 AM. J. INT'L L. 181, 181-82 (1986).

<sup>109</sup> Lithgow, 102 Eur. Ct. H.R. at 40 ("I have reached the conclusion that this matter should go no further and should be killed here and now.") Although the court found that the case was time barred on remand, it affirmed the result.

<sup>110</sup> Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 494 (1991).

<sup>111</sup> *Id.* (citation omitted).

<sup>112</sup> *Id.*



individual's fundamental rights."<sup>113</sup> Additionally, the European Court additionally found that "legitimate objectives of 'public interest,' such as measures of economic and social reform, could call for compensation at less than full market value."<sup>114</sup>

Since nationalization is an important public interest, compensation for nationalization can be less than the amount which is adequate for other public takings. In this respect it has been noted that:

[a] decision to enact nationalisation legislation will commonly involve consideration of various issues on which opinions within a democratic society may reasonably differ widely. Because of their direct knowledge of their society and its needs and resources, . . . the margin of appreciation available to them [the national authorities] should be a wide one. It would, in the Court's view, be artificial in this respect to divorce the decision as to the compensation terms from the actual decision to nationalise, since the factors influencing the latter will of necessity also influence the former. [I]t will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation.<sup>115</sup>

In other words, Parliament will determine the terms for compensation in the statute regarding nationalization; these terms are satisfactory as long as the legislature sanctions them. Parliament can take the cost of nationalization into account, and thus reduce the terms of compensation to make nationalization possible. The public interest in nationalization will outweigh the necessity for individual compensation.

Some critics of the compensation system have argued that consistent with the risk involved in investment, the purchase price accounts for the risk of nationalization.<sup>116</sup> Compensa-

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<sup>113</sup> Monroe Leigh, *Decision of the European Court of Human Rights, European Human Rights Convention - Compensation to Nationals Following Expropriation of Property*, 81 AM. J. INT'L L. 425, 426 (1987).

<sup>114</sup> *Id.* at 427.

<sup>115</sup> *Id.*

<sup>116</sup> See John Wilson, *Will Electricity Be a Good Investment*, THE TIMES, Mar. 26, 1990, at 33 ("The aim should be to give investors a long-term

tion is not necessary, therefore, when the element of chance disfavors the investor. These observers further argue that insurance companies could compensate investors in time of re-nationalization.<sup>117</sup> Using privatization in Eastern Europe as a model, "one leading U.S. insurance industry executive says that international firms participating in the privatization of state-owned companies in developing regions of the world owe it to their shareholders to protect those investments against 're-nationalization'."<sup>118</sup> Therefore, "[i]t is impossible for investment analysts to predict such loss-generating intangible factors such as political risk, but responsible firms should turn to the insurance industry to remove the uncertainty inherent in any privatization program."<sup>119</sup> British courts have not considered the insurance alternative. Although the alternative remains available, it is not a legally sanctioned form of compensation. The LP could politically benefit if it cites insurance as a possibility, but declines to apply it to British re-nationalization.

Given the expense of re-nationalization and its effect on the British treasury, the LP may consider compensation for less than fair market value. Several Labour members have already indicated a willingness to consider this alternative. This compensation system would allow them to adhere to their agenda of re-nationalizing some British industries. Further, it would minimize the cost of re-nationalization and save the British treasury from depletion. The LP could also promulgate terms of fair market value but not compensate for the depressing effect of nationalization. These legally available alternatives would practically enable the LP to re-nationalize.

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return commensurate with the risks involved in the industry.").

<sup>117</sup> See Greta Gainer, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 HOW. L.J. 1547 n.2 (1983) (stating that "[i]nvestors frequently can obtain some type of political risk insurance against nationalization.").

<sup>118</sup> *Insurance Industry Leader Says Firms Investing in Eastern Europe Privatization Should Guard Against 'Re-Nationalization'*, Bus. Wire, July 11, 1991; see also Phillip R. Trimble, *Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 382 (1984) (finding that "Congress has implemented an insurance program against foreign nationalizations.").

<sup>119</sup> *Insurance Industry Leader Says Firms Investing in Eastern Europe Privatization Should Guard Against "Re-Nationalization,"* *supra* note 118.

## 9. REGULATION AS AN ALTERNATIVE TO RE-NATIONALIZATION

Although the political climate will probably allow for the re-nationalization of some industries, Labour could not politically afford wide-spread re-nationalization with a reduced compensation system. However, the public disgust with the large profit margin enjoyed by privatized industries demands governmental attention. "The complaints [about profits of privatized industries] have grown louder as British Gas and some of the water companies have also unveiled fatter profits this week, despite the recession. Tory backbenchers have joined Labour in demanding that something be done."<sup>120</sup> Currently, many of the privatized industries operate as monopolies.<sup>121</sup> While promoting competition may reduce profit margins,<sup>122</sup> the state could police the industries more closely than if the industries remained competitive.

The LP's preference for a close relationship between the state and industry precludes it from fostering industrial competition. Yet the government must take action regarding these monopolies' large profit margins. Instead of immediate re-nationalization, the LP could first impose strict regulation.<sup>123</sup> The current regulation system has not minimized profits.

Their main method of control is the pricing formula known as "RPI-minus-x". This means that each firm must limit its product-price rises inflation . . . [i]f the regulator reckons that the firm is earning too high a monopoly profit, it can raise "x". So far, the regulators have raised "x" each time they have reviewed it.<sup>124</sup>

Yet because monopoly profits continue to increase, the LP will have to undertake much stricter controls. This degree of regulation will reduce profit margins and will affect shareholders's investments. One journalist has suggested that the LP "may impose very strict regulations, which may involve

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<sup>120</sup> *Can the Regulators Hold Them*, *supra* note 37.

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.* ("Big profits mean bad regulation").

<sup>124</sup> *Id.*

dividend control."<sup>125</sup>

Because stricter regulation will adversely affect shareholders, the issue of compensation arises. John Redwood, the corporate affairs minister for the Conservative government, has endorsed compensation for regulation. Mr. Redwood "was considering giving new powers to the regulatory bodies supervising the newly privatised nationalised industries. They might be allowed to adjudicate in disputes between companies and their individual customers. That could lead to compensation where a complaint was justified."<sup>126</sup>

While Redwoods's policy incorporates the tenets of the Conservative government, the LP cannot endorse it. First, shareholders invested in the industry knowing that there was risk; risk is inherent in any financial investment. Furthermore, compensating shareholders would mean that the industries operate on a regulated profit margin and perhaps at reduced efficiency. Nevertheless, the state pays enormous amounts of money to shareholders to compensate for the regulation of run-away profits. The LP could not afford this kind of expense if it were elected.

Moreover, British law does not mandate compensation for regulation and reduced profits.<sup>127</sup> In *BP Petroleum Developments v. Ryder*<sup>128</sup> the plaintiff wished to exploit the oil field under his land. Although the government had nationalized the oil industry, the plaintiff could apply for the right to exploit the oil. The government denied the plaintiff's application and the plaintiff sued for damages. Because the nationalized petroleum had not been completely taken from private individuals (they were still able to apply for licenses), the court

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<sup>125</sup> Wilson, *supra* note 116.

<sup>126</sup> Nicholas Wood, *Companies Likely to be Spared Burden of Petty Officialdom*, THE TIMES, June 21, 1991, at 7.

<sup>127</sup> Other democratic countries similarly refuse to compensate for regulatory action. Countries such as the United States do not require compensation for regulation because compensation is not needed to restrict the government's self-indulgence. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 36 (1985) ("courts allow governments to regulate without paying compensation for the harm that regulation inflicts on property owners. If the government is not self-aggrandizing, so that regulations are formulated in light of the public interest, the government can be trusted not to overregulate.").

<sup>128</sup> *BP Petroleum Developments Limited v. Ryder*, [1987] R.& R. 211 (1987).

permitted compensation. However, the court granted compensation commensurate with the reduction in the land value, and did not allow the plaintiff to recover lost profits. The court found that "[a] consequence of these principles is that the profitability of the land to the acquirer is irrelevant to the assessment of compensation."<sup>129</sup> The court further found that "[i]n contrast [to the land value approach] if the compensation is to be measured by reference to the profitability to an oil company of particular land, the quantum would vary in every case."<sup>130</sup>

Therefore, the LP should not consider the compensation issue upon stricter regulation of the privatized industries. Although regulation cannot replace nationalization in all instances, it represents a viable option for increased state control. Regardless, Labour is not legally obligated to compensate for regulation. Although Labour could manipulate the compensation system for re-nationalization, regulation is immediately viable. If the LP undertakes strict regulation, subsequent re-nationalization will be less complicated.

## 10. CONCLUSION

The Thatcher government altered the course of British economic development through privatization. Initially, these changes appeared permanent. "The privatization and liberalization programmes may turn out to be the most lasting achievements of the Thatcher administration."<sup>131</sup> Many British citizens became shareholders, some for the first time. Privatization appeared irreversible, but failure to improve administration of the state water system and the inequity of enormous profits for shareholders justify change.

The LP is firm in its commitment to re-nationalize some industries. Re-nationalization would raise legal questions regarding the liability to shareholders of these industries. British legal precedent offers the LP a clean slate; the law neither mandates a certain level of compensation nor provides precedential guidance. The LP could manipulate the terms of compensation and recapture the privatized industries without

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> PETER RIDDELL, *THE THATCHER GOVERNMENT* 182 (1985).

depleting the state's resources. Moreover, the LP can control the industries through regulation without legal consequence.

Labour must exploit these legal opportunities if it wants to fulfill its political agenda. Labour should initiate regulation of the industries it has pledged to re-nationalize, including the National Grid, hospital trusts, and water industry. Regulation does not require compensation, and would help to deflate the huge profits attributable to privatization. Labour, in turn, would benefit politically because the apparent benefits of privatization would be diminished. The LP would then be in a better position to re-nationalize. Reduced profits will depress share prices, thereby allowing the LP to capitalize by offering reduced compensation, if any, significantly decreasing the cost of compensation. This gradual process offers the most realistic opportunity for re-nationalization, one that the Labour must embrace to fulfill its commitment to re-nationalization.